CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

East'n District. *April*, 1819.

MAURIN *vs.* TOUSTIN.

EASTERN DISTRICT, APRIL TERM, 1819.

MAURIN vs. *TOUSTIN.*

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APPEAL from the court of the parish and city of New-Orleans.

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during her lying in, in bringing up said children, and medical attendance, taxes, &c. wherefore, she claims $870.

The defendant, in her answer, stated that she owed to the plaintiff the sum of $160 only, which she had tendered to the plaintiff's agent, and was ready to pay. She denied all other charges, and concluded, that the whole concerns, between the plaintiff and herself (except as to the aforesaid $160) were settled by a judgment in a suit, wherein she, the present defendant, was plaintiff, and Lucile, the present plaintiff's vendee, defendant, wherein the present plaintiff intervened as warrantor, and in which, the wages of the slave were fixed at six dollars per month only, in consideration of the sums expended in her maintainance and that of her children.

The plaintiff had a verdict and judgment for $533 14, and the defendant appealed.

There is not any statement of facts, but the parish judge has certified that the record contains all the facts, upon which the cause was tried.

W. Planté deposed that he hired the slave, for about three years at four dollars per month: she left him, about three years ago, being pregnant of her first child, and has had another since.

She was attended, in her lying in, and other

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indispositions, by Dr. Dufour; the plaintiff's agent: while she was at the deponent's, she was clothed at the plaintiff's expense. She had no severe malady, while she was at the deponent's, but was severely sick at Dr. Dufour's. As soon as the deponent discovered her pregnancy, he sent her back, as she was very delicate, of but little service in that situation, and required great care. She rendered no service at the doctor's during her pregnancy, nor while she suckled her children. He values the expenses of her clothing, at $18 per year, and those of her lying in, at from $10 to 15 each time.—That the expenses of a child's food, while the mother is very weak, are from three to four dollars per month.

Madeleine Marren deposed that she hired the slave for four years, and paid for her at the rate of four dollars per month: she was clothed by her mistress: since she left the deponent, she had two children, and was delivered and attended by Dr. Dufour. She has been several times sick, as well as her children. The charges of lying in of slaves are from $12 to 14, in ordinary cases. The witness would not have taken care of her and her children for their victuals and clothes.

Touron, deposed that he saw the slave, for these five or six years, almost every week, that she appeared very healthy, that the defendant hired

her for $15 per month; and she came home twice a day to suckle her child.

With the record comes up, a bill of exceptions to the opinion of the parish court, in directing the jury that "it was their duty, to take into consideration, the charges in the plaintiff's account, relative to the two children; as it appeared to the court, that the supreme court would not, nor could not decide in their decree, any thing upon a fact of which they were ignorant, viz: the birth of the children, during the pendency of the suit of *Toustin* vs. *Lucile*,"—to which opinion the defendant's counsel excepted.

It is useless for us to take into consideration, the propriety of a charge of an inferior court to the jury, when the whole facts are spread upon the record. For, to send back the case for a new trial, with directions to withhold the part of the charge excepted to, or to give another, would be productive of delay only: as, upon a new appeal, whatever might be the verdict, unless it was a special one, it would be our duty to weigh the evidence, as if there was no verdict.

It does not appear to us, that the plea of *res judicata* can avail the defendant; as the present plaintiff was only brought in as a warrantor to defend the title she had given, and no damages could be awarded against her.

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In examining the account, we find an allowance of $370, properly supported by evidence, for the consideration of the sale, with legal interest therein, the expenses of lying in, medical attendance in sickness, clothing and taxes: but it does not appear to us, that the other charges are sufficiently supported by any evidence on the record.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and proceeding to give such a judgment as, in the opinion of this court, ought to have been given in the parish court, it is further ordered, adjudged and decreed, that the plaintiff recover from the defendant, the sum of $370, with costs, in the parish court, and that he pay costs in this court.

Davezac for the plaintiff—*Morel* for the defendant.

MILES vs. *HIS CREDITORS.*

Some property to be ceded, is not requisite to entitle the debtor, to the benefit of the insolvent laws.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a case in which the debtor claims the benefit of the act of the territorial legisla-

ture for the relief of insolvent debtors in actual custody, 1808, *c.* 16, 2 *Martin's Digest*, 440. To his petition is annexed a schedule of his debts, and a declaration, that he has no property. This declaration, the district court considered as a sufficient badge of fraud, to deny him any relief under the law, and gave judgment accordingly.

We are of opinion, that the district court erred, in considering the bare circumstance of the want of property in the debtor, sufficient to deprive him of the benefit of our insolvent laws, when no fraudulent conduct was proven against him. This would be denying the aid of such laws to persons most clearly insolvent; those who have nothing wherewith to pay their debts.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that the case be remanded, with directions to the district judge, to proceed therein according to law.

Preston for the plaintiff—*Eustis* for the defendants.

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HEWES
vs.
LAUVE.

HEWES vs. *LAUVE.*

A creditor of a person, for whose debt the defendant is sued, is not an incompetent witness for the plaintiff.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff states that the defendant is an auctioneer, and certain persons, trading under the firm of J. Howe and co. for some time past sold goods at public aution, under his name and sanction; that, by various acts, the defendant made himself responsible for the sales and transactions of said J. Howe and co.—that the plaintiff delivered certain goods to J. Howe and co. to be sold at auction, which were accordingly sold, and the proceeds received by them or the defendant, to the amount of $545, that the said J. Howe and co. have absconded, and the said sum is due to the plaintiff by the defendant.

There was judgment for the latter, and the former appealed.

The case comes up before us on a bill of exceptions. The plaintiff offered Roderick M'Leod, as a witness, to prove transactions of the defendant with J. Howe and co. and persons who had dealings with them, in order to establish the existence of a partnership between the defendant and J. Howe and co. He objected to M'Leod's admission as a witness, because the

latter had instituted a suit by attachment against J. Howe and co. The district court sustained the objection, and the plaintiff took his bill of exceptions.

The defendant contends that the witness was properly rejected; our statute disabling all persons, directly or indirectly interested in the cause, from being heard. *Civ. Code.* 312, *art.* 248.

In the present case, the witness is not a creditor of either of the parties; but it is alledged that, if the defendant be cast and the debt paid by him, the estate of J. Howe and co. will be discharged therefrom, and the witness will have a better chance of recovering what they owe him.

The absolute insolvency of J. Howe and co. does not appear from any evidence on the record. The circumstance of their absconding does not alone suffice to establish it. It might be owing to other causes. This being the case, it is useless to enquire whether the interest alledged, if it existed, would occasion the incompetency of the witness.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court, be annulled, avoided and reversed, and that the cause be reminded with directions to the district judge, not to reject Roderick M'Leod, as a wit-

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ness, if there be no other objection made to his admission, and it is ordered, adjudged and decreed, that the defendant and appellee pay the costs of this appeal.

Duncan for the plaintiff, *Livingston* for the defendant.

FLEEKNER vs. *GRIEVE'S SYNDICS.*

In determinon the propriety of allowing a *ded. pot.* the court may look into the record of another suit, between the same parties. So may the supreme court, on the appeal, if that record be there also.

If fraud be not alleged, no *ded. pot.* shall be granted to prove it.

The affidavit ought to specify the fact, intended to be proven, that the opposite party may avoid the delay by admitting it.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. This case is before us on a bill of exceptions to the opinion of the district court, in refusing to the defendants a *dedimus potestatem*.

The plaintiff claims rent, for certain premises from the defendants, who pleaded the general issue only.

A short time, after the period fixed for an application for a *ded. pot.* the defendants claimed one, on an affidavit, that they had just come to the knowledge that certain persons, in England, could not only disprove the plaintiff's claim for rent, but also prove that the pretended title, under which the claims, was given and executed in fraud of the creditors represented by the de-

fendants. The district judge gave as a reason for the refusal that the matter, expected to be proven, was *res judicata*, between the same parties, in a former suit.

There is not any statement of facts, and we are not enabled by the record to discover, whether the matter be really *res judicata*.

The plaintiff's counsel has attempted to shew it by the production of the record of the case, in which the alledged decision took place. It is the record of a suit originating in the court *a quo*, and the defendants' counsel contends that we cannot take notice of it, as it makes no part of, nor is referred to in, that of the present suit. The case is on our files, as it came up to this court and was finally decided by us, and the district court was directed to carry our judgment into effect. Hence, it is in our knowledge that the matter is *res judicata*, and this appears by the record of this court. It was also in the knowledge of the district court, who was correct in noticing it, since it there appears on record also.

Farther, it appears to us that the affidavit was insufficient. The only fact, which is positively stated, is that the plaintiff's title was given and executed in fraud; but fraud was not alledged,

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and the pleadings did not allow any evidence of it.

The facts, by which the claim for rent was expected to be disproven ought to have been specifically stated, in order that the plaintiff might exercise his right of averting the delay, by an admission of them; which, from the manner in which the affidavit is worded, cannot be done, without admitting the consequences drawn by the adverse party from unknown facts.

It is, therefore, ordered, adjudged and decreed, that the judgment of the district court be ed with costs.

Smith for the plaintiff, *Livingston* for the defendants.

JOHNSON vs. *DAVIDSON*.

If the testator dispose of property, which he was bound to leave to his brothers and sisters and leave an executor, a defensor will be appointed to them, but no curator till after a division.

APPEAL from the court of probates of the parish of Orleans.

MATTHEWS, J. delivered the opinion of the court. This is a case in which the appellant made application to the court of probates, to be appointed curator of the absent heirs of James Johnson, late of New-Orleans, deceased, who it

seems made a will, by which he instituted his natural children, now residing in Scotland, his universal heirs, leaving some inconsiderable legacies to his brothers, and appointed the appellee one of his testamentary executors, who has since taken on himself the execution of the will.

According to the provisions of our statute, "natural children, if the father leaves legitimate brothers and sisters, can receive from him, either by donation *inter vivos* or *causa mortis*, only one half of his estate." *Civ. Code*, 210, *art.* 14. Every disposition, in favor of persons incapable of receiving, is declared null and void. *Id.* 212, *art.* 17.

Amongst the curators, which may be appointed, according to our law, it is clear that a curator, when necessary, may be appointed to persons, who are absent from the state, and have property within it, such as heirs to a succession. In cases of testaments, the testamentary executor, when some of the heirs of the testator are absent, and not represented in the state, is, nevertheless, authorised to take possession of the property of the succession, and to remain in possession of the portion belonging to the absent heirs, until they shall have sent their power of attorney, or until the expiration of the year. *Id.* 246, *art.* 169.

This article, it is thought, can only apply to

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cases, where all the heirs (both those who are absent and the others) have been instituted by the testator in his will; as it is the duty of the executor to carry into full effect the intentions of the testator.

The present case is singular, in its circumstances. The testament is null and void, so far as it purports to dispose of more than one half of the deceased's estate. For, he institutes his natural children heirs, and shews, by legacies to his brothers, that he had relations, of that degree, in existence. The estate is not vacant, and cannot be administered as such; because the executors are clearly entitled to the care and management of it, and have an interest opposed to the rights of the legal heirs.

Curators of absent heirs, are persons appointed by the judge to take care of, and administer on, the portion of an estate *ab intestato*, which falls to the share of such absentees, "in cases where some of the heirs only are absent and not represented." *Ib.* 172, *art.* 121.

Considering the estste of the deceased to be *ab intestato*, for that portion of it, which is attempted to be disposed of by will, contrary to law, and to which collateral relations of the deceased, absent and not represented, are entitled, it is the duty of the judge of probates, to appoint

a curator "to take care of, and administer on their shares."

But, before that can be ascertained, it is necessary that a partition should take place, (according to the provisions of the law, in such a case made and provided) to effect which, a defensor must be appointed to protect the rights of the absentees. *Id.* 174, *art.* 130.

Until a partition of an estate, it ought not to be placed in the possession of, and administered by persons, holding under different rights; who, when their claims are equally good to have the management of an undivided half, are so also for the management of the whole; and the estate cannot be administered by parts, till a division takes place. We are of opinion that no curator ought to be appointed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be affirmed with costs.

Morel for the plaintiff, *Smith* for the defendant.

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DUNCAN & AL. SYNDICS vs. BECHTEL.

If there be a plea in abatement and of the general issue, on appeal after a judgment on the merits, if the plea in abatement do not appear to have been pronounced upon, nor urged by the counsel, the supreme court will not notice it.

DUNCAN & AL. SYNDICS vs. *BECHTEL.*

APPEAL from the court of the first district.

MATTHEWS, J. delivered the opinion of the court. This is an action for money had, and received by the defendant to the use of the plaintiffs. They do not state, in their petition, any of the circumstances under which he received it. The answer, besides the general issue, contains an exception to the petition, as not setting forth the cause of action with sufficient certainty.

We are of opinion, that the petition does not pursue the true sense and spirit of the acts of the legislature, which regulate the practice of our courts. It is not sufficiently explicit of the cause of action, in stating the manner, in which the money came to the hands of the defendant—how he obtained it—from what persons, &c. Every circumstance, which may be considered proper to be known, in order to put the defendant on a just defence of the suit, ought to have been stated.

But, as no decision on this exception, appears to have been given in the district court—nor, appears to have been insisted on, by the defendant's counsel, who, after pleading the general issue, appealed from a judgment on the merits, we deem it unnecessary to notice it.

The defence on the merits, as it is understood from the argument of counsel (for, on the record, there is not sufficient perspicuity to point it out) is satisfaction and payment made to Jackson, one of the firm of Duncan and Jackson, for whose benefit this action is instituted by Duncan, from whom the money was received by the defendants and appellants.

The record of the suit, referred to in the statement of facts, shews clearly that Duncan was a fraudulent partner, and had embezzled to a great extent the funds of the firm, for which judgment was obtained against him by the syndics. It further appears, from a document on file, that Jackson acknowledged satisfaction for said judgment, on receiving less than its amount.

It is the opinion of this court, that these transactions are not sufficient to exonerate the defendant, as debtor to the late firm of Duncan and Jackson: although he may have become indebted to it, in consequence of a contract with Duncan alone, whilst it is evident, that this contrast related to the funds of the partnership.

It is, therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

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DUNCAN & AL. SYNDICS vs. RICHTER.

Duncan for the plaintiffs, *Hennen* for the defendants.

SAULET vs. *LOISEAU.*

A new trial will not be granted, to afford an opportunity to shew, that a witness, sworn without any objection, forswore himself.

APPEAL from the court of the parish and city of New-Orleans.

The defendant, in February 1789, sold to the plaintiff a negro slave named Jacob, for $714, with the condition, that, if the slave, sick at the time, was not perfectly cured, within one month, he should take him back and repay the price. The parties placed the slave under the care of a free negro, named George, who undertook to cure him, and to whom each of the parties promised to pay ten dollars therefore.

A few days after the expiration of the month, the plaintiff brought his action to recover the price with interest, stating that Jacob, far from being cured, died on the 6th of March.

The defendant pleaded the general issue, admitted the sale—and the condition—contending that the plaintiff had no cause of action, as Jacob was not returned within the month, without having been cured, that the sale took place on the 5th of February, and on the 4th of March, when

the month expired, according to the conditions of the sale, he was cured.

There was a verdict for the plaintiff, and the defendant moved for a new trial, which was refused; and judgment being given for the former, the latter appealed.

The record shews, that George was the only witness introduced by the plaintiff.

He deposed that, he received Jacob from the parties, (who promised him ten dollars each,) that he laboured under a complaint of the chest—that he was weekly supplied with meat and biscuit by the defendant; the plaintiff never furnishing any thing. At the request of the former, he put Jacob in irons, to prevent his going abroad and eating improper food. The plaintiff was once only at the deponent's, and was informed Jacob was not yet cured.

Gassie, a witness introduced by the defendant, deposed, that he was employed from the 9th of February to the 15th of March, 1818, by the defendant, that during that time, the plaintiff came to the defendant, and the witness heard them talk of a negro, of a sale, and heard the plaintiff tell to the defendant, "he is doing well; he is doing well." This was in the presence of Julien.

Julien deposed that, on the 4th of March, he was at the defendant's with Gassie and the plaintiff, and heard the latter say to the former, that

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Jacob was in good health, eating and drinking well.

De Armas, for the plaintiff. The new trial was properly refused. If the verdict was contrary to law or evidence, the affidavit should have specified in what particlular point. 3 *Martin*, 280.

An application for a new trial, in order to impeach the credit of a witness sworn at the trial, cannot be listened to. *Bunn* vs. *Hoyt*, 3 *Johns.* 253.

The testimony of George, the plaintiff's witness, is not contradicted. The jury might give full credit to what the defendant's witnesses deposed, and to the testimony of George himself, and arrive to the conclusion to which they came. It is not to be denied that Gassie and Julien heard the plaintiff say, that Jacob was doing well; that he was doing well, eating and drinking well. Let it be admitted, that these expressions were used, and does it not follow, from the death of the slave, which almost followed the uttering of these words, that the plaintiff laboured under an error ?

But this pretended confession of the plaintiff is not conclusive against the plaintiff. It is not proved by two witnesses, and was made in the absence of the defendant.

The extra judicial confession, proved by, at

least, two witnesses, makes full proof, when made to the party. But, if it be made in his absence, although supported by the testimony of one witness, or other presumption, it is only a semi-proof. *Cur. Phil.* 1, 17, *n.* 6, *Febrero*, 2, 3, 1, § 7, *n.* 294.

Were this confession to be considered as full proof, still the plaintiff could shew that it was made in error. If one admit or deny any thing, in court, thro' error, he will be allowed, if he can, to prove the error, at any time before judgment, although the admission was made before the judge. *Part.* 3, 15, 5. If then the error of a judicial confession may be proven, *a fortiori*, in the present case, that of an extra-judicial one. The plaintiff has proven the error of his, by the testimony of George.

Gregorio Lopez, in his commentary on this law of the partidas, cites the opinions of Baldus and Andreas. *Et nota quod erronea confessio, etiam sæpius repetita, non nocet. Et quid si, cum confessione, concurrunt aliqua indicia? Dic quod probetur contrarium. Andreas dicit quod error probabitur dicendo se errasse, et probando rem aliter se habere.* These opinions are grounded on *ff* 2, 2, 42, *Non fatetur qui errat, nisi jus ignoraverit.*

Cuvillier, for the defendant: A new trial

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ought to have been granted, because the verdict was contrary to law, being grounded on the testimony of one single witness, contradicted by that of two others. It was contrary to the weight of the evidence, two witnesses having sworn that the plaintiff had admitted the cure of the slave. New proofs were discovered since the verdict, by which the defendant will be enabled, on a new trial, to shew that the deposition of George deserves no credit.

The plaintiff's counsel contends that, the particulars, in which the verdict was contended to be contrary to the evidence, ought to have been specified in the affidavit, and cites, for this purpose, 3 *Martin*, 280, where a rule of the supreme court requires such a specification in a petition for a rehearing in that court. The rules of that court cannot be considered as applicable to the parish court.

But the affidavit, on which the new trial was prayed, shews, that since the trial, the defendant has discovered new witnesses, by which he is enabled to deprive the deposition of George from the credit, which it has received.

Now, *ex natura rei*, such witnesses could not have been deemed necessary, and could not have been procured before the trial: for, till George was sworn, the defendant could not have presumed his intended deviation from the truth. And

during the hurry of the trial, when this deviation was noticed, it was not possible instantly to discover and adduce the witnesses, by whom the defendant may establish the perjury committed.

Farther, according to the tenor of the contract, if the negro was not cured, the sale was to be rescinded, and the defendant was to take back the slave, and refund the price. He was sold on the 5th of February: the month, mentioned in the condition, expired, on the 4th of March; the negro was then alive, and, according to the testimony taken from the lips of the party, doing well, eating and drinking heartily; and, if the plaintiff wished to rescind the sale, it was his duty to deliver or return the slave immediately. As he did not do so, the presumption is that, he was pleased with the bargain, and desirous of availing himself of it. He must, therefore, support any consequent loss.

DUBIGNY, J. delivered the opinion of the court. The defendant and appellant, Francis Loiseau, sold to the appellee, Balthazar Saulet, a negro slave, named Jacob, under this condition: "It is agreed and covenanted that, whereas the said slave is now in bad health, this sale shall be rescinded, in case he shall not be perfectly recovered in one month from this date, and the said Loiseau shall take back said slave and re-

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pay the price thereof to said B. Saulet." Both parties then went to one George, a free negro man, who undertakes cures, and left the slave under his care at their joint expense. Thirty days after, the slave died; the object of the present suit is to recover the purchase money.

George was sworn as a witness, and established the facts on which the appellee relies. His testimony was not objected to; but after the verdict, the defendant made a motion for a new trial, offering to prove that George had forsworn himself, on one point, and was unworthy of belief. Without examining whether this was a case, where new a trial could be granted for the purpose of discrediting a witness, we are satisfied that the affidavit, on which it was prayed for, was insufficient, and that the court below was right in refusing it.

The testimony of George, who swore that Jacob was very sick for several days previous to his death, has been attempted to be shaken by that of two witnesses, one of whom heard the plaintiff tell the defendant, two days before Jacob's death, that the sick negro was going on well; and the other, who was present on the same occasion, recollects that the negro was mentioned by the name of Jacob, and that the appellee said he was in good health, drinking and eating well. The appellee's opinion of the situation of that slave is,

however, very immaterial, for it is in evidence that he never went to see him, and spoke of course from report.

The counsel for the appellant has put a construction upon the clause above quoted, which cannot bear him out. He thinks, that if the slave was not cured at the end of one month, it was the duty of the appellee to return or offer to return him to the appellant at that very time, and that in defect of making such tender, his recourse under the reservation was gone.—We see nothing in the reservation which warrants such an interpretation. The stipulation is "that if the slave shall not be properly recovered in one month from the date, the sale shall be rescinded, &c.—The plaintiff proves that he did not recover at all, but died of his complaint. That is proving more than he was bound to do to support his action.

It is, therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

GOFORTH vs. *HIS CREDITORS.*

The expenses of the liquida-

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tion of an insolvent's estate, are to be paid out of the uncumbered property ceded, but, if that be insufficient, out of the rest.

DERBIGNY, J. delivered the opinion of the court. In this case a tableau of distribution of the monies, proceeding from the estate of William Goforth, an insolvent debtor, was filed by the syndics of his creditors, and was opposed by one of them, Antoine Curraby, who, as vendor of a house which constituted the principal part of the said estate, pretends to be entitled to the full price of that house above all other priviledges.

Carraby is not a creditor, who exercised the right of *revendication*, that is to say, of taking back his property in kind, without suffering it to be included in the common stock of all the creditors. He had no such right, because by selling on credit and delivering the possession, he had parted with the ownership of the thing, and vested it completely in the buyer himself, retaining only a lien on the property for the price of sale. *Cur. Phil.* 2, 12, 6.

At the auction of the property surrendered by Goforth, Carraby became the purchaser of the same house, and now refuses to pay any part of the price. But in order, the better to try this question, we will suppose that a third person has bought the property, and that the purchase money is now in the hands of the syndics, ready to be distributed among the creditors according to their rank.

The price of the house, together with the pro-

ceeds of sale of some tracts of land on Lafourche, and of a lot of ground, in one of the suburbs of this city, constitute, according to the tableau, the common stock now ready for distribution —The first payment in order, is that of the expenses incurred to obtain a settlement of the estate of the insolvent; for they are in fact, debts contracted by the creditors themselves, none of whom ought to receive any thing, until they are satisfied.

In this case, the tableau exhibits a list of those expenses, such as notary's fees, auctioneer's commission, &c. to the payment of which there does appear to be any objection.

But the remuneration due to the attornies of the insolvent of the syndics, and of the absent creditors, and the commission of the syndics are not mentioned therein, and are included under the head of debts claimed by privilege, against which Antoine Carraby has pleaded that his own privilege is of a superior order.

It is clear, however, that the compensation for services rendered to the syndics is a debt due by the mass of the creditors; that the commission of the syndics themselves is a claim of the same nature; and as to the remuneration to which the attorney of the insolvent may be entitled, it has been settled in the case of *Morel* vs. *the syndics of Misotiere*, 3 *Martin*, 363, that such services are also to be considered, when useful to the cre-

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ditors, as services done to themselves.—Is that to be paid out of the common stock, as well as notary's fees, auctioneer's commission, &c.? Evidently so. Either all, or none, of those who are employed in settling and liquidating the estate of the insolvent, must be paid. Those are all charges of the same kind, charges against the creditors generally. Carraby might have pleaded that these charges are not due, or that they are two high; but to refuse payment altogether without alledging any other motive than that his privilege is of a superior rank, is to assign no very intelligible reason. Does he mean to say that he ought not to bear any part of the expenses incurred by the body of the creditors? But suppose the vendors of the lands on Lafourche, and of the lot in the suburb were unpaid, and had raised the same pretension, what would have become then of the payment of expenses? Was the notary who enrolled the meeting of the creditors, the attorney who conducted the proceedings, the clerk who recorded them, to receive no compensation for their services? It can hardly be supposed that Carraby's plea intends to convey any such idea.

The expenses must be paid, and if Carraby, instead of being called upon to surrender their amount, was now requiring the syndics to deliver him the full price for which the house was

sold, they would have a right to withhold it, until it might be ascertained whether enough could be raised out of the personal estate and unincumbered property of the insolvent to pay the expenses. But the syndics demand of Carraby the purchase money of his house in order to pay those charges, ought he not to be authorised to retain it, until they can satisfactorily shew that they have not been able to raise any other funds out of the insolvent's personal estate and unincumbered real property? We are of opinion that he ought.

The only other items in the list of priviledged debts, besides that of Carraby as vendor, are claims for repairs done to the house. Those seem to have been left for further investigation, and to be unconnected with the object of the present appeal.

It is ordered, adjudged and decreed, that the judgment of the parish court be reversed; and this court, proceeding to give such judgment as, in their opinion, ought to have been given below, do order and decree, that the expenses incurred towards liquidating ths estate of William Goforth, including therein the compensation awarded to the attorney, employed by him and his syndics, and the commission of the said syndics on the goods by them administered, be paid

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out of the personal and unincumbered real property of the said Goforth; and should these prove insufficient, after due diligence shewn on the part of the syndics to collect them, then out of the remainder of the estate of said insolvent in the hands of Antoine Carraby, and that the appellants pay all costs.

Morel for the claimant, *Carleton* for the syndics.

CROIZET'S HEIRS vs. *GAUDET.*

Parol evidence may be heard, when the verity or good faith of an act is contested.

The heir may shew that a sale made by his ancestor is feigned. So might the latter.

APPEAL from the court of the second district.

DERBIGNY, J. delivered the opinion of the court. The plaintiffs and appellees, as children and legal heirs of Simon Croizet, claim from the appellant, in his capacity of curator to the estate of Mary Martin Dumontet, the restitution of a tract of land, which they alledge was conveyed to her, in trust, by their ancestor, under the semblance of a sale, to be reconveyed by her, after his death, to two of his children, whom he intended to favor, to the prejudice of the others. The sale is clothed with all the solemnities required by law, and the principal ground of de-

fence of the appellant is, that such an instrument has nothing to fear from the attacks of verbal evidence; and, as verbal evidence has been admitted in this case, he has excepted to its introduction.

The general rule that no parol testimony is to be heard against or beyond what is contained in a written act, is a safeguard, established by law for securing *bona fide* contracts from any attempt to alter or vary them; but whenever an act is impeached as false, fraudulent or feigned, the rule does not apply. The question there is no longer shall the contents of a written act be preserved unaltered, but is this a *bona fide* act? When an act is made with an intent to cheat third persons, there is, generally, nothing on the face of it, which can detect such intention. The parties take good care to give it as fair an aspect as if it was made in good faith and strict honesty. What then is to be done? Is fraud and villainy to be sheltered under the rule that no witnesses can disprove any thing contained in a written act? No. The contents of the act are not in question. The verity, the reality of the contract, the good faith of the parties is the object of enquiry. To come at a knowledge of the facts from which this may be ascertained, oral evidence must be heard. The conduct of the parties, their revelations, and all the circum-

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stances which may tend to disclose the artifice, and remove the veil under which truth lies concealed, become a fair subject of investigation. The defendant does not deny this as a general principle; for, he readily admitted that, if Croizet's creditors, instead of his children, were plaintiffs in this case, they would have a right to do what the children have here attempted. But he says, that the heirs of Croizet are bound by his acts, and have no right to shew that, which, were he alive, would not be permitted even to alledge.

From these, two questions arise: 1. Could Simon Croizet, if alive, plead that this is a feigned sale? 2. If he could not, can the present plaintiffs plead it?

1. That the party to a feigned contract may plead the simulation is admitted, in general terms, by the Spanish jurists. Their opinion is predicated principally on that maxim of the Roman law: *plus valere quod agitur, quam quod simulate concipitur.* Febrero, who has treated the question more extensively than any of the authors within our reach, after having enumerated the different sorts of simulation, expresses himself as follows: *En estos tres casos, aunque el damnificado manifiesta su torpeza y delito en haber intervenido en la simulacion, puede no ob-*

stante alegarla, no para fundar su intencion, sino para coadyuvar la contra el participe, porque trata de evitar su dano, y este lucrarse en su detrimento. Y lo mismo puede hacer su heredero, con tal que el contrato no sea en fraude del fisco, u de otro tercero. Provided the simulation be such that no third person be defrauded by it, it may be pleaded by the party, who is willing to expose his own turpitude. Here, then, if we take the plaintiffs to be altogether in the room of Simon Croizet, there are no third persons defrauded by the alledged simulation. and it may be pleaded. Whether in support of such a plea, the party can produce oral evidence alone, unaided by any written testimony, is a question of some importance; and as there is no necessity to decide it here absolutely, we will pass to the consideration of the other point, to wit, can the present plaintiffs plead the simulation of this contract as persons distinct from their father, and produce parol proof in suport of their allegation?

II. The plaintiffs we take to be the legitimate children of Simon Croizet; for after their allegation that they are Croizet's legal heirs and representatives, the admission of the defendant that they are his children, goes fully to establish that fact.

The plaintiffs then, as such legitimate children,

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are entitled by law to a portion of their father's estate, which it was not in his power to deprive them of, except for the causes also expressed by law. Where a parent has, by any practice, endeavoured to remove from the reach of his children that which the law made it his duty to preserve for them, their interest, instead of deriving from their ancestor, is in direct opposition to his acts. To pretend that, because they are his children, they are bound by such acts, would be giving countenance to a violation of the law, and annihilating rights which the law has created. With respect then to their legitimate portion, children have rights, which not only are independent and distinct from those of their parents, but may be, as in this case, directly at war, with those which their parents wish to exercise. Children entitled to a *legitime* are quasi creditors of their parent's estate: "*legitima non dicitur lucrum, sed quasi debitum.*" *Lopez, on Part.* 6, 10, 8. Hence, children are not bound by the donations, even *inter vivos,* which their parents may have made to the prejudice of their *legitime,* and may sue the donees to have the donations reduced to the amount which the donor could dispose of. *Civ. Code,* 212, *art.* 19—26. *A fortiori,* can they attack the acts of their parents, by which they are, not merely prejudiced, but defrauded.—For the purpose then of asserting

their rights to the *legitime* secured to them by law, children must be viewed in the character of third persons, and as such be permitted to alledge and prove any thing that creditors might avail themselves of —It is, therefore our opinion, that the district judge acted correctly in admitting on their part, any evidence which could establish the simulation of the contract, by which they say they have been defrauded.

As to the nature of the evidence received and the weight which it ought to have, we do not think ourselves at liberty to take that into consideration; there being in the record no statement of facts, nor any certificate shewing that *all* the evidence is there contained.

It is therefore, ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Turner for the plaintiffs, *Henry* for the defendant.

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APPEAL from the court of the parish and city of New-Orleans.

When the illegality of a contract is not pleaded, and does not appear from the evidence in support of it, if there be a verdict for the plaintiff, the judgment will not be disturbed, though some evidence of the illegality may result from a cross examination of the plaintiff's witnesses, or from the testimony adduced by the defendant.

For a statement of the facts, see the opinion of the court.

Workman, for the defendant. This is one of these extraordinary suits, to determine which, correctly, will require all the care and attention of the court. We maintain that the claim of the plaintiff is founded in impudent fraud, and supported only by nefarious perjury.

It appears by the testimony on the record, that some time in the month of February, 1817, Fitzgerald went down to the English Turn, where Harvey had been some time. Fitzgerald took a lodging for him at the milk house in this city, visited him there occasionally, discounted some western bank notes for him, and, having paid some of his expenses, took a passage for him to Liverpool. The first intelligence Fitzgerald had of him, was by a letter written from the Balize, and received about ten days after his departure feom New-Orleans. In this letter, he states that he expects a schooner of his will speedily arrive in this port from Campeachy, which he begs the defendant to take charge of

for him, and dispose of the cargo on his account; and he concludes with *an earnest request of the defendant to accept for him a bill for 50 pounds.* Would any such request have been made, in such terms, if he had left in the hands of the defendant property to the amount of $9000, or of half or quarter that value?

The plaintiff's next letter, dated Ulverstone, June 20, 1817, presses the defendant to write to him; talks of his suits in the supreme court, and says, that he is quite unhappy about this business. The next letter, dated the same place, June 27, 1817, appeals to the defendant as his *assured and generous friend;* hopes that he (defendant) *will not be offended at the length and frequency of his letters, though he has ample reason to be so,* and again recurs to the business of the law suits, &c. The next letter is from the same place, dated August 6th, 1817. It speaks, as before, of the causes in the supreme court, adjures the defendant, by the mercy of God, to write to him, and informs him that he has *taken the liberty* of drawing on him for 100 pounds. *However,* he adds, *if you are under a certainty of my having received the expected relief from Washington ere this, then you need not accept it, as in that case it will be unnecessary.* Is not this observation incompatible with the assertion that the writer had left any considerable property at all, with Fitzgerald?

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The plaintiff's next letter is from Ulverstone, September 30th, 1817. The writer says, "again I have to inform you that *Counsellor Ingersol* never wrote to me, though I sent him all the sworn attestations of my mate and crew, and also the notary public's declaration. I cannot tell what can cause this miserable delay. The underwriters cannot want more proof than I have given. It is grievous to me, I assure you, more than I can say. I entreat of you, for the mercy of God, to write them yourself, and let me know their answer per next opportunity," &c.

This letter is important, as connected with another part of our testimony;—that, to wit, by which it is admitted that Fitzgerald called on Mr. Ingersol at Philadelphia, to enquire concerning the causes spoken of by the plaintiff. Mr. Ingersol said he knew nothing of any such cause. This shews that the defendant believed the plaintiff was speaking of a real, not a sham, transaction; and will, therefore, satisfactorily account for the defendant's having received some of Harvey's letters without expressing any surprise at the correspondence. The same inference may be fairly drawn from the letter of the plaintiff's, in which he promises the defendant the consignment of a vessel and cargo from Campeachy. These remarks may be proper to rebut the insinuation so often made and

so much insisted upon by the opposite party—"If Fitzgerald had no other business with Harvey than what he alledges, concerning the discounting of the Kentucky bank notes, why did he continue to receive these letters of Harvey's and keep them in his pocket.?"

The next letter of the plaintiff's is dated Ulverstone, January 21st, 1818. He speaks of the cruel and shameful conduct of Captain Sandford towards him; how infamously he had abused his (plaintiff's) credulity; though strong, and fortified by distance, &c. he (plaintiff) threatens to visit his thoughts with more troubles than he is aware of. It is strange, the letter adds, he had not artfully invented *some plausible tale* all this while, but it is now too late for credulity to swallow. I shall not delay your time longer with a business that I am determined, after a sufficient season, to give publicity enough to."

Perhaps he (Sandford) has now serious thoughts of selling my schooner, which you recollect he has in his power: let him do so, and it will only hurry the termination of his infamy and exposition."

These letters appear to shew, that at the time of writing them, the plaintiff had formed, in his mind, that plan of fraud and forgery which he is now endeavoring to carry into execution. The letters in question have an air of constraint and

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mystery. When the writer says "*it is strange he has not invented some plausible tale*," he probably had in contemplation those letters which he had determined to forge, which are now offered in proof of his claim. The plausible tale he thought of for the supposed Captain Sandford, is the pretended sale of the imaginary coffee and logwood, to Wellman and Phillips. The bankruptcy of that firm he could easily have learnt, as he resided so near Liverpool. In fact, it does appear, from his letter to Mr. William Brown, that he was acquainted with that event.

These considerations will also serve to account for a circumstance, which, at first, seemed very extraordinary, viz: the mention in the plaintiff's letter of Fitzgerald's illness. That letter is dated in March, 1818, and that the illness happened in September, 1817. There is, therefore, nothing in the least surprising that Harvey should have heard of it in the intervening period.

The very ingenious fabrication of the Orleans post mark, is by no means a wonderful effort of forgery. He, who could so well imitate the defendant's hand writing, and write letters in such a variety of hands, would find little difficulty in imitating a post mark, so well as it has been done in this instance. The last letter of this person to the defendant, is dated New-Orleans, October

1818. It is filled with invectives and reproaches, no longer mysterious and indirect; and is evidently intended as an instrument of extortion. By the menace of an accusation of some hidden and atrocious crime, the writer, no doubt, expected to be able to obtain his ends without producing his forged letters, and thereby exposing himself to the risk of punishment. For, let it be remarked, that he did not produce those letters for a long time subsequent to his arrival in New Orleans, nor until he found his letter of menace had entirely failed of its intended effect.

It is evident that Fitzgerald had no apprehensions from any thing which this letter hints at, or threatens;—from the following circumstances:

1. That he left no instructions with his agents, Messrs. Cummins and Ramsay, not to open any letters sent to him during his absence;

2. That he expressed no dissatisfaction, or disapprobation on finding that these letters had been opened without his consent;—and that he has actually shewed the letter in question to several persons;

3. That on receiving intelligence of what was passing, he immediately repaired to this city, where he has ever since remained, and appeared in public.

4. That so far from dreading any accusation

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that the plaintiff might make against him, or any testimony that he could give, if he were disposed to turn state's evidence and informer, Fitzgerald has exerted himself repeatedly to have the plaintiff arrested.

This completely destroys the imputation that Fitzgerald was only anxious to get his opponent put out of the way.

There is another circumstance strongly in favor of Fitzgerald's innocence. A short time before he left New-Orleans for the north, he was offered $12000 for his house in Royal-street; one half of the money down, the other in negotiable notes. Would he—would any man in his senses have refused this offer, and left the state, menaced, as he then was, by Harvey, and knowing that the property, which he could have so easily converted into cash and taken with him, was exposed to be seized in a suit like the present? Either this suit is groundless, or Fitzgerald must be an absolute iedot.

Although this fact, taken by itself, might not be considered decisive, it corroborates powerfully all the other circumstances in the defendant's favor.

But what can account for the conduct of Harvey in this extraordinary transaction? *Habitual guilt and extreme misery*. From the variety of

his modes of writing, it is evident he must be an expert, able, and long practiced forger of writings; and his letters acknowledge his extreme poverty. He thought that the business which he had actually transacted with Fitzgerald would serve as a foundation for his subsequent operations;—as a point on which the machinery of his fraud might be conveniently established. Without some such support, all attempts of the kind would have been obviously void and idle: and this may account for his selecting the defendant, in preference to any other person here, as the object of his depredation.

Stratagems of this sort, though of very rare occurrence on this side of the Atlantic, are frequently attempted in Europe by the unprincipled and desperate.

The plaintiff's letters, to which I have requested the attention of the court, are fatal to his claim, whether they are construed *literally*, or otherwise. If taken literally, there was evidently no sale of, no transaction whatever between the parties relative to, the coffee or logwood, on which the suit is founded. If the letters are to be considered as mere cyphers, then there must be some unknown, some mysterious transaction between the parties, very different from that lawful one, which the plaintiff sets forth in his petition. In this case, he cannot recover. His peti-

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tion is sworn to. If his demand is not proved as it is there stated, the whole of course must fall to the ground.

Again; if those letters be written enigmatically, why does not the plaintiff explain them? He must have the key or clue to them; and he alone is competent, according to our rules of evidence, to produce it. It is for the plaintiff to make out and prove his own case. If there is any mystery lurking in his letters, it affords an additional proof of his villainy, which alone must be sufficient to defeat his action.

In the letters attributed to Fitzgerald, all is plain and clear. Coffee and logwood are called by their proper names. Would this have been the case, if these letters were genuine, and if any such transactions as these mysterious letters hint at, had ever taken place? If there had, then Fitzgerald's letters would have been in the same style of mystery and cypher as those of Harvey.

As to the meetings stated to have taken place between the parties, they can prove nothing more than that Fitzgerald was desirous of knowing, what his adversary meditated against him, or at worst, that he wished to purchase his peace: a thing which the law allows every man to do.

With respect to the account current, annexed to one of the letters attributed to the defendant, I think it bears internal evidence that is a forgery.

1. The price of the coffee in it is credited too high, by at least *four* cents per pound. How could this arise; when, by the supposition, it was the intention of Fitzgerald to defraud Harvey?

2. No commission whatever, is charged to Harvey. Why omit this charge, when the person supposed to make this false account is endeavouring to cheat his correspondent.

3. This account of the sales of upwards of nine thousand dollars worth of Harvey's property is dated March 2d, the very day that Harvey is proved to have sailed from New-Orleans, and but a few days previous to the time, when he earnestly supplicates Fitzgerald to accept for him a bill of *L.* 50, sterling. Is not this circumstance alone decisive of the case?

4. The fabrification of the names of Wellman and Phillips, as the purchasers of Harvey's property, was too gross a blunder for any but a downright ideot to have made. The falsehood of the pretended sale could not have escaped very speedy detection. With respect to the facts stated in the fabricated letters, the plaintiff might, and probably did, know many or most of them, inasmuch as he admits having received *other letters* from Fitzgerald, which he does *not produce.*

Why does he not produce these letters? Because they would prove that his claim is un-

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founded. We have no copies of them; and, if we had, they would not be evidence for us. The plaintiff's holding back these letters is a decisive presumption against him. There is no real, no solid foundation whatever for this suit. No delivery of merchandize has been proved. No mention of coffee or logwood is to be found in any of the letters of the plaintiff, nor in the depositions of any of the witnesses, though they have been closely interrogated as to every part of the defendant's trade and transactions. No receipt has been produced, or is pretended ever to have been given by the defendant for the merchandize in question. Is it probable, is it possible, that any man, least of all such a man as Harvey, would have placed property to the amount of $9,500 in the hands of another, and quit the country without ever asking for a receipt or acknowledgment of it?

In such an action as this, it as necessary to prove the *corpus pacti*—the existence of the matter or substance of the contract, as in a penal case it is indispensable to prove the *corpus criminis*. Without this, even the confession of the accused is not sufficient to convict him.

According to Harvey's own admission and statements, the transaction on which he builds this suit, is one prohibited by law: and if any credit be given to what he says in his latest mena-

cing letter, it is some transaction of the blackest guilt. Such a plaintiff can surely not recover, in such a case, even if every thing he states were taken for granted. The Roman law on this point is most clear. "If a stipulation is made on account, or in consideration of any offence already *committed*, or *about to be committed*, such stipulation is void from the beginning. *Si, flagitii faciendi vel facti causa, concepta sit stipulatio, ab initio non valet.*

The Spanish law is equally positive. Stipulations against the laws or sound morals are proscribed and void. 1 *Sala's Illustracion*, 238, *Part. 5*, 11, 28 & 38.

"It is indispensable to the validity of a contract, that it be *licita, honesta, y arreglada à la ley y buenas costumbres. Febrero*, 1, 18 § 1.

These rules appear to be universal, admitting no exception in any case where *both* of the parties are in fault.

In the English law books, we find some instances where contracts, made *contrary to the provision of statutes*, are allowed to have effect to a certain extent, by the court of chancery; on which I beg leave to observe:—

1. That our tribunals have no such power as that exercised by courts of chancery; the power of modifying and mitigating the rigor of severe laws.

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2. In the cases alluded to, where that mitigating power has been exercised, the offence has been of a very dubious nature; the offence of usurious contracts. Some of our best ethical and political writers deny that there is any turpitude, injustice, or immorality in such conventions.

3. Lastly, the offence, in most if not all of these cases, was not consummated, but only intended. The usurious interest was stipulated for, but not actually received. Thus the court rendered a judgment in the case of Catalina Lopez, which at first view seems to militate with the principles here laid down. But on nature consideration it will appear that there were several important circumstances which distinguished that case from the present.

1. That was a case of a *simulated contract*, where no consideration whatever, was given, and therefore the contract was wholly void.

2. The *immorality* of the *purpose of* that contract is by no means clear. The plaintiff's testator apprehended that his enemies would institute against him, some unjust prosecution, and he therefore, wished to put his property out of their reach. Many simulated contracts, may be supposed perfectly consistent with morality and the laws—a simulated contract of sale, for instance, to skreen our property from the enemies of our country; and the like.

3. Whatever, may have been the intentions of that testator, he did not, in fact, violate any law. he did not withdraw his property from the pursuit of justice or of injustice; for no prosecution whatever, was instituted against him. Even he must be considered rather as intentionally than as actually culpable, on the harshest construction of his conduct.

4. But above all, that case is distinguished from the present by this circumstance, that in the former, the plaintiffs were innocent, and represent those who were perfectly innocent of any fraud or deception whatever. The plaintiffs were the executors of the simulated vendor, representing his creditors. As to *them*, the reason of our maxim does not all apply. The object of of the law is to discourage illicit transactions.—But no encouragement is given to wrong doers by affording relief to their creditors, nor even, perhaps to their heirs. Such persons, in general, care little about either. At all events the principal of the law is positive that where the plaintiff is innocent, he may recover back what he hath paid, given or transferred without a just cause or good consideration. *ff. De condictione ob turpem causam.*

In the English and American jurisprudence, the authorities on the point now under consideration are; (Here the counsel referred to various

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English and American reporters.) Our own Civil Code, 264, art. 31 & 23, adopts the same doctrine. And all are agreed, even in England where the strictest rules of special pleading are adopted, that if from the plaintiff's own stating, *or otherwise*, the cause of action appears to arise *ex turpi causa*, or the breach of positive law, the plaintiff cannot recover. No court will lend its aid to a man, who founds his cause of action upon an immoral or illegal act. "Whenever courts of law see attempts made to conceal wicked deeds, they will brush away the cobweb, varnish and shew the transactions in their true light." It is not necessary for the defendant to plead the illegality or immorality of the transaction; for it is not for his sake, but for public justice that such a defence is allowed. Were it required to put such a defence upon record, it would of course seldom or never be done. It would be a confession of guilt which might lead a defendant to the gibbet or the whipping post. Such a doctrine in pleading would be an effectual provision for enabling malefactors to enforce their contracts with each other. Thieves, robbers and pirates might then boldly sue the receivers of their plunder, well assured that the defendants would not dare to put their own crimes and infamy upon record. [Here the council cited a great number of books in support of the doctrine

for which he contended.] It is the policy of the law, not to give to such villains any assistance whatever, but to defeat their conventions and break up their confederacies. They will then have no resource left, but to come out against each other as state's evidence and informers, and thus the community will be benefitted by their detection and punishment.

Hennen, for the plaintiff. From the testimony produced by the defendant himself, it is evident that there were some transactions, between him and the plaintiff, of long standing. He continued to receive letters from the defendant, for upwards of a twelvemonth, and then, when a note of the defendant's was presented to him, he told the notary, he knew nothing about him. The whole conduct of Fitzgerald throughout this business, was marked by falsehood, duplicity and fraud. If there was any mystery or enigma in the letters, surely Fitzgerald must know it. Why then does he not explain it? Why does not he tell the court who is meant by that infamous *Capt. Sanford*, who so cruelly and shamefully abused the credulity of his friend, and endeavoured to cheat him of his property. The defendant would do better, to say nothing about villainy in this business. If there is any villainy in it, he has his full share.

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As to what is said of Fitzgerald's application to Mr. Ingersol, it is of little consequence; as that application was made, after he had heard of Harvey's arrival in this city to sue him. Nor will the court allow any weight to the circumstance of Fitzgerald's refusing to sell his house. It is always through some weakness, folly or oversight, that fraud and villainy are detected. *Quos deus vult perdere*, &c.

The letters and account current, on which the action is founded, have been proved to be the hand writing of the defendant by several credible witnesses—respectable gentlemen of the banks, perfectly acquainted with Fitzgerald's hand writing. The only testimony, at all in opposition to this, was given by persons who had been told by Fitzgerald, that the letters were forgeries, and whose minds were therefore prejudiced.

The proof of the post mark by the clerk of the post office, first sets the question of the genuineness of those letters at rest. The private meetings and conferences, between the defendant and Harvey, at the very time, when the latter pretended he was endeavoring to have him arrested, explain this as well as other parts of his conduct. Basset's testimony on this point is conclusive.

On the whole, nothing appears which can jus-

tify the court, in disturbing the verdict of the jury, on the grounds stated by the defendant. If the verdict is to be altered, it can only be by increasing the damages. As to the question of law, as to the defence set up of a smuggling transaction, it cannot be admitted in this cause. There is no proof that Fitzgerald knew of any such transaction, if it ever existed. The property was delivered to him to be sold by him, for the owner. How the owner acquired it, or how he introduced it into this city, was no business of the defendant. It is only when both parties are *in pari delicto*, that this defence is admissible.

But if such a defence were applicable, it could avail only when pleaded on the record. It was indispensable according to the rules of our practice, and those of the codes from which ours was taken, to plead such a defence before any evidence of it could be given, in order that the opposite party might be put upon his guard, and enabled to rebut the testimony that might be offered against him. [In support of this position, the counsel cited various authorities from the Pandects, and from the Spanish law.]

MATTHEWS, J. delivered the opinion of the court. This is an action brought by Harvey, to recover the price or value of a quantity of merchandize, described in the petition, which he

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alledges were placed by him in the possession of Fitzgerald, to be sold on commission for and on account of the plaintiff. He charges the defendant with an intention of defrauding him, by detaining the proceeds of the merchandize to his own use.

The answer contains a general denial of all the allegations in the petition, and on this issue alone, the case was tried by a jury in the court below, where a general verdict was found for the plaintiff, and judgment having been given therein, the defendant appealed.

In the course of the trial, in the court *â quo*, it appeared by the testimony of some witnesses, that the plaintiff had acknowledged that the goods, to recover the value of which this suit is brought, were smuggled, and that it was a smuggling transaction between him and the defendant.

On this evidence, it is insisted by the counsel of the defendant and appellant, that should this court be of opinion that such a contract, as stated in the petition, really existed between the parties, it must be considered as illegal and void, on account of having for its foundation a transaction in fraud of the revenue laws of the United States—that is one, in which courts of justice ought not to interfere to relieve either party, according to the maxim, *ex turpi causa non oritur actio.*

The principal evidence, in support of the plaintiff's claim, consists of letters from the defendant, and a feigned account of sale of the goods, made by him to Wellman and Phillips. Witnesses were also introduced to shew the intimacy, which subsisted between the parties, about the time at which the property may be supposed to have been delivered to the defendant. From the whole testimony, as it comes up with the record, we see no reason to differ from the jury, in relation to the important facts of the case.

Contracts, which are founded on smuggling transactions, wherein both parties have been concerned, are clearly such as will not be enforced by courts of justice, and whenever facts are established according to sound rules of pleading and evidence, shewing their illegality and turpitude, actions to carry them into effect ought not to be sustained.

Since this cause was argued on its merits, a new discussion has taken place, at the request of the court, on the question whether the defendants can take advantage of the illegality of the contract, without having alledged it in his answer. Our laws, on the subject of the practice of courts in civil cases, contain provisions tending as much as possible to simplify it and relieve us from all unnecessary technical rules, relating

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to special pleadings. But parties, in a suit are bound on the one side, plainly and substantially to set forth the cause of action, and on the other, the means of defence—a denial of the facts stated in the petition, or a statement of other facts in avoidance of those. It is necessary to a fair administration of justice that such certainty should prevail in pleading, as to put each party on his guard. The rule of law, which requires that judgments should be rendered *super allegata et probata*, is founded on common sense and principles of justice. The illegality of a contract, arising from transactions *in fraudem legis*, may be taken advantage of by a plea in bar, a peremptory exception of the civil law, and should be regularly pleaded as that of *doli mali* or *rei judicatæ*. Such pleas, of necessity, carry with them a suggestion of facts, in avoidance of those stated by the plaintiff and often require testimonial proof of their truth, which the opposite party may rebut. In an action grounded on an engagement, entered into with a view to contravene the general policy of the laws, if the plaintiff, by the evidence in support of his claim, should also shew the turpitude and illegality of the transaction, perhaps it would be the duty of the court, before whom the suit was instituted, immediately to dismiss it. But the present case, from any thing that appears on the record, is not

thus circumstanced. It does not appear with certainty by which of the parties, the witnesses were introduced, who testified to the confession of the plaintiff that the transaction was a smuggling one. From the manner in which the testimony is arranged on the record, this confession, seems, in the first instance, to have been drawn from one of the plaintiff's witnesses, by cross-examination, on the part of the defendant, and in the second, to have been proven by a witness of the latter.

It is true, that the maxim, *Nemo allegans suam turpitudinem est audiendus*, appears to be opposed to any system of pleading, which would compel a defendant to alledge his own turpitude. Whether this rule be applicable only to plaintiffs, who call on courts of justice to enforce their base and illegal agreements, and ought not to be invoked against a defendant, is a question, which in the present case there is no necessity of determining. The civil law puts the exception of general illegality on the same footing with those of *doli mali*, or *rei judicatæ*, *&c. ff.* 44, 1, 3. No principle of jurisprudence exists to prevent a defendant from alledging the turpitude of the plaintiff, and such allegation would answer all reasonable purposes of the strictest rule of pleading, by putting the adversary on his guard: although it should afterwards appear that they were both equally base or immoral.

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From this view of the case, the judgment of the parish court might be affirmed, without any reasoning, were it not that there are cross appeals. The plaintiff contends that the damages, assessed by the jury, are too small. As the contest between the parties is involved in some doubt and mystery, and as the verdict is not contrary to evidence, and the probable justice of the case,

It is ordered, adjudged and decreed, that the judgment be affirmed, and that each party pay his own costs in this court.